OUZINKIE NATIVE CORP.
v.
EDWARD N. OPHEIM

IBLA 84-356 Decided October 19, 1984

Appeal from a decision of Administrative Law Judge E. Kendall Clarke, Hearings Division, Office of Hearings and Appeals, rejecting appellant's Alaska Native allotment application AA-2911.

Affirmed as modified.

1. Alaska: Alaska Native Claims Settlement Act -- Alaska: Native Allotments -- Alaska Native Claims Settlement Act: Generally -- Applications and Entries: Filing

An Alaska Native allotment application is deemed pending before the Department of the Interior on Dec. 18, 1971, if it was filed in any bureau, division, or agency of the Department on or before Dec. 18, 1971. Evidence of pendency before the Department on or before Dec. 18, 1971, shall be satisfied by any bureau, division, or agency time stamp, or by affidavit of any bureau, division, or agency officer that the application was received on or before Dec. 18, 1971.

2. Alaska: Alaska Native Claims Settlement Act -- Alaska: Native Allotments -- Alaska: Alaska Native Claims Settlement Act: Generally

An applicant for an Alaska Native allotment must prove with clear and credible evidence that he has been in substantially continuous use and occupancy of the land for a period of 5 years. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not mere intermittent use. Substantially continuous use and occupancy, at least potentially exclusive of others, is not established where others have regularly used the subject land for grazing, hunting, trapping, and berrypicking, and where the applicant has never notoriously possessed the land in a manner affording notice to others that he claims the land.

3. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Appeals -- Hearings -- Rules of Practice: Hearings

A second hearing will not be afforded to an Alaska Native allotment applicant where the applicant was afforded an initial hearing in accordance with due process, and where nothing has been submitted which suggests that an additional hearing would produce a different result. Where an applicant fails to introduce all relevant evidence at an initial hearing when such evidence was available and could have been submitted, he waives his right to introduce that evidence. A further hearing is not necessary in the absence of a material issue of fact which, if proven, would alter the disposition of the appeal.

APPEARANCES: Alan L. Schmitt, Esq., Kodiak, Alaska, for appellant; David P. Wolf, Esq., Anchorage, Alaska, for Ouzinkie Native Corporation.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Edward N. Opheim has appealed a decision of Administrative Law Judge E. Kendall Clarke, Hearings Division, Office of Hearings and Appeals, dated February 7, 1984, rejecting appellant's Native allotment application for his designated "Parcel B." Judge Clarke's decision involved a private contest brought by Ouzinkie Native Corporation (Ouzinkie) against appellant's Native allotment application AA-2911 for Parcel B. The decision rejecting appellant's allotment application was premised on two bases: (1) appellant did not prove that his Native allotment application was filed before December 18, 1971; and (2) appellant did not prove that his use and occupancy of the subject land was substantially continuous use and occupancy, at least potentially exclusive of others.

The contest complaint was filed with the Bureau of Land Management (BLM) on July 3, 1980, by Ouzinkie. Ouzinkie had filed an application for the subject land in T. 26 S., R. 19 W., Seward Meridian. Ouzinkie asserted the following as grounds for its contest: (1) Opheim's application was filed after December 18, 1971; (2) Opheim has failed to establish his entitlement to the subject land through clear and credible evidence; (3) Opheim did not use the land prior to 1940 when the land was segregated by Exec. Order No. 8344; and (4) even if Opheim used the land prior to its segregation in 1940, he did not use it potentially exclusive of others, and his use conflicted with prior Native community use. See Contest Complaint 2-3.

On September 20 and 21, 1982, the contest was heard by Judge Clarke. After the submission of briefs by Opheim and Ouzinkie, the decision was rendered on February 7, 1984. Opheim has now appealed the decision, contending that all of the requisite conditions to receive the allotment have been met.

On May 31, 1968, the Bureau of Indian Affairs (BIA) filed Native allotment application AA-2911 on behalf of Opheim for approximately 36 acres (Parcel A) in T. 26 S., R. 19 W., Seward Meridian, Alaska. On April 10,

1972, BIA filed a Native allotment application on behalf of Opheim for approximately 100 additional acres (Parcel B) also contained in T. 26 S., R. 19 W., Seward Meridian. Opheim executed the application to Parcel B under date of May 27, 1968. Opheim executed another Native allotment application for parcel B on November 12, 1970, which was received in the Alaska State Office, BLM, on November 17, 1970. Only Parcel B is in dispute in the instant appeal. 1/

The evidence adduced at the hearing indicates the following facts. Parcel B is located on the northeastern portion of Spruce Island, Alaska. This area is commonly known as the East Cape. Spruce Island is small enough that the Natives are able to walk the entire length of the island and return in the same day. The eastern half of the island is dominated by a high point known as Mount Herman. The area east of Mount Herman was known as Monk's Bay. Ouzinkie is the only village on the island.

Appellant came to Spruce Island as a child. His father homesteaded an area known as Sunny Cove, which was about midway on the southern shore of Spruce Island. Opheim's Native allotment application for Parcel A, which is not contested, encompasses approximately 36 acres in the Sunny Cove area. Beginning in 1923, Opheim's father brought some cattle to Sunny Cove. The cattle grazed at the east end of the island. Opheim testified that his cattle and cattle belonging to others in Ouzinkie wandered back and forth from each end of the island.

Many witnesses from the area were called to testify concerning the nature, use, and occupancy of Parcel B. Parcel B has been used for various purposes by many residents of the area since appellant came to Spruce Island. Several area residents had cattle which grazed on the land. Many used the land for berrypicking, trapping, and hunting. All residents who testified never believed that the land belonged to Opheim, or was claimed by him. Many trapped and hunted on the land without seeking Opheim's permission because they did not believe Opheim owned or claimed the land. The area residents never in any way recognized Parcel B as Opheim's land.

Opheim lived at Sunny Cove during the early 1930's. He bought a sawmill in the 1940's, and moved the mill to the Sunny Cove area. He cut logs for his sawmill from the East Cape area, and built a cabin there for his logging operation. Opheim was away from Spruce Island at various times. He was gone from about 1936 or 1937 until he returned to Ouzinkie to operate a pool hall in the early 1940's. He did not return to the Sunny Cove area until approximately 1947, when he closed his pool hall in Ouzinkie.

In 1948 Opheim constructed a larger sawmill in Sunny Cove, and engaged in logging operations on Parcel B under a series of timber cutting permits. Opheim had a cabin on Parcel B which he used in connection with his logging operation.

1/ The land disputed herein was the subject of a prior appeal to this Board. See Ouzinkie Native Corp. v. Opheim, 45 IBLA 198 (1980), by which the matter was remanded to BLM with instructions to afford Ouzinkie the opportunity to bring contest.

On his Native allotment application, executed on May 27, 1968, Opheim asserted that he occupied Parcel B from May 1947 to the present, except for seasonal absence from the land. He claimed that he had cattle grazing there since the early 1930's. He claimed that he had been trapping, logging, hunting, and berrypicking on the land since May 1947. However, on his application executed on November 12, 1970, Opheim asserted that he occupied the subject land since 1938 with no absence.

Among those issues raised on appeal include: (1) whether the application itself was filed before December 18, 1971, as evidenced by the BLM date stamp on the application; and (2) whether appellant's use and occupancy of the land had to begin prior to 1940, and whether, in fact, it did.

[1] Appellant's application was filed pursuant to the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). This Act authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo who resides in and is a Native of Alaska, and who is the head of a family or is 21 years of age. An allotment shall not be made under the Act until the applicant has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970); 43 CFR 2561.2; 43 CFR 2561.0-5(a). The Act was later repealed on December 18, 1971, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982). See, e.g., Nora L. Sanford (On Reconsideration), 63 IBLA 335, 337 (1982); William Yurioff, 43 IBLA 14, 15 (1979); Jessie Jim, 22 IBLA 54, 55 (1974). However, applications pending in the Department of the Interior on December 18, 1971, may be processed to patent, all else being regular. E.g., Charlie R. Biederman, 61 IBLA 189, 191 (1982); Susie Ondola, 17 IBLA 359, 360 (1974).

In a memorandum to the Director, BLM, dated October 18, 1973, Assistant Secretary of the Interior Horton stated:

> This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971. [Emphasis in original.]

See Katmailand, Inc., 77 IBLA 347, 353-54 (1983); Nora L. Sanford (On Reconsideration), supra at 15; William Yurioff, supra at 337, where this Board applied the Assistant Secretary's memorandum interpreting the phrase "pending before the Department on December 18, 1971."

In the instant case, Judge Clarke found that Opheim's application for Parcel B was not filed prior to December 18, 1971. However, there is substantial evidence in the record reflecting that Opheim's application was filed prior to December 18, 1971. One of Opheim's applications, hearing exhibit A, was signed and dated on November 12, 1970, and was date stamped November 17, 1970, as received by BLM. This date stamp by BLM satisfies the proof requirement of pendency before the Department prior to December 18, 1971. See Nora L. Sanford (On Reconsideration), supra at 15; William Yurioff, supra at 337. Also, numerous other documents in the record reflect that Opheim's application was pending before the Department of the Interior before December 18, 1971. 2/ We therefore conclude that the BLM date stamp, as well as the other documents, constitute sufficient proof to establish pendency of Opheim's application prior to December 18, 1971. See Katmailand, Inc., supra at 354; Nora L. Sanford (On Reconsideration), supra at 15; William Yurioff, supra at 337. Thus, Judge Clarke erred to the extent that he based rejection of Opheim's allotment application on his finding that Opheim's application was not pending before the Department prior to December 18, 1971.

[2] The second basis for Judge Clarke's rejection of Opheim's allotment application was that "Opheim has not shown [that his] use of parcel B was to the potential exclusion of other users either before 1940 or after 1940" (Dec. at 11). In his statement of reasons, Opheim contends that use and occupancy did not have to begin prior to 1940. However, in order to resolve this appeal, it is not necessary to determine whether or not Opheim's use and occupancy of Parcel B must be analyzed before or after 1940. The evidence adduced establishes that Opheim's use and occupancy of Parcel B, both before and after 1940, was not "substantially continuous use and occupancy" or "potentially exclusive" as mandated by 43 CFR 2561.2 and 43 CFR 2561.0-5.

43 CFR 2561.2 provides in pertinent part:

> An allotment will not be made until the lands are surveyed by the Bureau of Land Management, and until the applicant or the authorized officer of the Bureau of Indian Affairs has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant.

43 CFR 2561.0-5(a) provides:

> The term "substantially continuous use and occupancy" contem-plates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well- being and that of his family. Such use and occupancy must be

2/ Among those documents are: (1) a notarized statement of Barbara A. Booher, an employee of BIA with access to agency files; and (2) letters from Delores N. Roullier to Opheim dated Dec. 9, 1970, and Feb. 25, 1972 (hearing exhibits B and E). We have repeatedly confirmed that filing with BIA prior to Dec. 18, 1971, satisfied the requirement that an allotment application be pending before the Department on that date. E.g., Katmailand, Inc., supra at 354; Nora L. Sanford (On Reconsideration), supra at 337.

substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

It is worth noting that an applicant for a Native allotment has the burden of proving substantially continuous use and occupancy. E.g., Kathryn Eluska, 23 IBLA 284, 286 (1976); Gregory Anelum, Sr., 21 IBLA 230, 232 (1975); Annie Blue, 18 IBLA 60, 61 (1974). "[T]he burden to present clear and credible evidence to establish entitlement is upon the applicant." Gregory Anelon, Sr., supra at 232 (emphasis added).

In the instant appeal, appellant has been afforded a full and fair opportunity at the contest hearing to present evidence to establish his entitlement to an allotment. Opheim presented some evidence of his use and occupancy of the subject land. However, the appellant was required to establish with clear and credible evidence "substantially continuous use and occupancy * * * at least potentially exclusive of others." 43 CFR 2561.0-5(a). See 43 CFR 2561.2. The "substantially continuous use and occupancy" standard has been addressed by this Board in many cases. E.g., Jimmie A. George, Sr., 60 IBLA 14, 16 (1981); United States v. Flynn, 53 IBLA 208, 227-28 (1981); Myrtle Jaycox, 22 IBLA 324, 235-26 (1975); Jack Gosuk, 22 IBLA 392, 394 (1975); Annie Blue, supra at 61; John Nanlook, 17 IBLA 353, 355 (1974); Natalia Wassilliey, 17 IBLA 348, 350 (1974). In Natalia Wassilliey, supra, this Board noted that the applicant must establish use and occupancy "to the potential exclusion of all others." (Emphasis added.) In Myrtle Jaycox, supra, the applicant and others in her community used the subject land to pick wild berries from time to time. The Board held that "intermittent berry picking on a patch used by others without additional showings of potentially exclusive use does not meet the regulatory requirements of substantially continuous use and occupancy." An almost identical scenario is presented in the instant appeal where Opheim and other members of the community used Parcel B to graze cattle, hunt, trap and pick berries. This use of Parcel B by others raises serious questions as to whether Opheim's use and occupancy was potentially exclusive of others as mandated by 43 CFR 2561.0-5(a). "Potential exclusivity, or independent use * * * is key to an allotment grant." Pedro Bay Corp., 78 IBLA 196, 203 (1984). See Andrew Petla, 43 IBLA 186, 198-201 (1979) (Burski, A. J. concurring).

Many residents had cattle which grazed on the subject land. Many trapped and hunted on Parcel B. The area residents never sought Opheim's permission to use the land because they did not believe that Opheim owned, claimed, or controlled the land. Opheim was granted permits by BLM to cut timber on the subject land from September 6, 1957, to September 5, 1958, and May 8, 1963, to May 7, 1964. These timber permits did not exclude others from using the land. The timber permits only granted Opheim a temporary right to use the land for timber cutting as specified in the permits. Such limited rights are not considered the type of use and occupancy required for an allotment. Opheim had a grazing lease on Parcel B from January 1, 1959, to December 31, 1978. See hearing exhibit 23. Opheim's grazing lease did not provide for the requisite substantial and continuous use and occupancy potentially exclusive of others. Section 3 of the grazing lease in fact required Opheim to allow others to use the same land. Section 6(b) of the grazing lease further required Opheim to remove his property from the land

at the expiration of the lease or else that property would become property of the United States. Therefore, because his principal uses of the land were grazing and logging, and these were conducted under the aegis of permits and leases issued specifically for these purposes which were temporary and expressly non-exclusive, such uses cannot be considered qualifying.

The totality of Opheim's use and occupancy of Parcel B was not sufficiently notorious, continuous, and of such a nature to put others on notice of his claim to the land. See United States v. 10.95 Acres of Land, 75 F. Supp. 841, 844 (D. Alaska 1948); United States v. Flynn, supra at 227. See also United States v. State of Alaska, 201 F. Supp. 796. Opheim's use of the land was not "notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers on notice that the land is in the use and occupancy of another." Andrew Petla, supra at 199. Thus, Judge Clarke properly rejected Opheim's allotment application for this reason.

Appellant argues that the segregation of Parcel B by Exec. Order No. 8344 was later revoked, so that there was nothing to preclude a valid entry from April 16, 1962, until October 28, 1983. See Statement of Reasons at 4-7. However, even if this argument were valid, Opheim had a grazing lease in effect from January 1, 1959, to December 31, 1978. See Hearing Exh. 23. A grazing lease segregates the lands from appropriation by a Native allotment applicant and an applicant cannot initiate any rights to settlement while the grazing lease was in effect. Floyd L. Anderson, 41 IBLA 280 (1979). Appellant contends that his grazing lease protected Parcel B from all adverse settlement or appropriation, thus leaving the opportunity to initiate settlement under the Native Allotment Act exclusively to him. We disagree, on the premise that federal land which is available for settlement or location must be equally open to all qualified entrymen or applicants, so that if the grazing lease segregated the land against settlement by others, as it did, it must be held to have barred lawful settlement by him as well. The issue is moot, however, in light of our holding that his use and occupancy was non-qualifying in any event.

[3] In his statement of reasons, appellant has requested a second hearing to present additional evidence concerning the status of appellant's grazing lease (Statement of Reasons at 8). At the contest hearing, appellant was afforded a full and fair opportunity to present evidence to establish his entitlement to an allotment. Appellant's failure to introduce all relevant evidence at the first hearing results in a waiver of his right to submit additional evidence which could have been submitted at the first hearing. To allow appellant an additional hearing to introduce evidence which could have been introduced at the original hearing could lead to an endless progression of unnecessary hearings. The original hearing was in accordance with due process. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). Therefore, another hearing is not required. Moreover, a hearing is not necessary in the absence of a material issue of fact which, if proven, would alter the disposition of the appeal. E.g., Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); United States v. Consolidated Mining & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). Here, there are no additional facts which would alter the disposition of this appeal because we have held that Opheim's use and occupancy of the land both before and after 1940 was insufficient to entitle him

to an allotment. In United States v. Andy Synbad, 42 IBLA 313, 322 (1979), aff'd, United States v. Synbad, Civ. No. 82-203 PHX-CLJ (9th Cir., April 6, 1983), we noted:

> A second hearing will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he actually was present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. * * * A petition to reopen a hearing for submission of further evidence will be denied where the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. United States v. Hansen, 26 IBLA 300 (1976).

See United States v. Whitney, 51 IBLA 73, 88 (1980); United States v. Franklin, 45 IBLA 54, 58 (1980). We, therefore, conclude that an additional hearing on appellant's asserted grounds would not alter the disposition of this appeal, thus, appellant's request for an additional hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified for the reasons stated herein.

Edward W. Stuebing
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

R. W. Mullen
Administrative Judge